In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 503

BEAR SALES COMPANY, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

After full administrative proceedings, the Federal Trade Commission held that petitioners had violated Section 5 of the Federal Trade Commission Act by selling merchandise, through others, by means of lottery schemes, gift enterprises, or games of chance (Pet. 33-38), and issued a cease-and-desist order (Pet. 39-40). The court of appeals affirmed in a brief *per curiam* opinion (Pet. 43-47).

Petitioners sell various items of merchandise through so-called push-cards (Pet. 34). They dis-

tribute the cards to persons who then sell chances on the merchandise to their friends and acquaintances. Each card contains a number of partially perforated discs, and the purchaser pushes out the disc he selects. The amount he must pay is not revealed until after he has made his selection. Only one of the discs on each card gives the purchaser any merchandise, and the identity of that disc is not revealed until all have been pushed. (Pet. 34-35.)

The basic question presented is whether the Federal Trade Commission properly held that this use of a gambling device as a sales method is an unfair method of competition because contrary to public policy. More than 30 years ago this Court unanimously upheld a Commission order prohibiting the sale of merchandise through a gambling scheme, on the ground that "the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy," *Federal Trade Commission* v. *R. F. Keppel & Bro. Inc.*, 291 U.S. 304, 313. Petitioners (who did not deny before the Commission that their sales system involves a lottery (Pet. 35-36)) argue that in recent years there has been a sufficient change in the public attitude toward gambling so that the use of games of chance as a method of selling merchandise can no longer be condemned as an unfair method of competition. But nearly all of the States which condemned private lotteries and similar schemes at the time of *Keppel* continue to do so, including the fifteen States that the petitioners cite (Pet. 7-8) as permitting limited exceptions to the general prohibition

against gambling.[1] Moreover, the public policy of the United States continues to condemn the use of lotteries in interstate commerce or the mails. 18 U.S.C. 1301, 1302; 39 U.S.C. 4005.

In these circumstances, the Commission was fully justified in concluding that petitioners "failed to demonstrate that the public's concern with lotteries as evidenced by the various state and federal laws dealing with lottery and related practices had changed significantly to enable the Commission to conclude that lotteries were no longer against public policy" (Pet. 41). Accord, *Dandy Products, Inc.* v. *Federal Trade Commission*, 332 F. 2d 985 (C.A. 7) and cases cited therein.

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[1] Cal. Const. Art. 4, § 26; Del. Code Ann. 11 § 664 A (1953); Fla. Const. Art. 3, § 23; Ill. Const. Art. IV, § 27; Ky. Rev. Stat. § 436.360 (1962); Md. Code Ann. 27 § 356 (1957); Mont. Rev. Code Ann. 94-3001, 3003 (1947); N.H. Rev. Stat. Ann. 577.1 (1955); N.J. Stat. Ann. 2A:121-1 (1953); McKinney's Consolidated Laws of New York Ann., Penal § 1372 (1944); Nev. Rev. Stat. §§ 462.010, 462.040 (1963); Ohio Rev. Code Ann. § 2915.12 (1954); Purdon's Penna. Stat. Ann. 18 § 4601 (1963); R.I. Gen. Laws § 11-19-1 (1957); S.D. Code of 1939 § 24.0201.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

JAMES MCI. HENDERSON,
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SEPTEMBER 1966.

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